



**Beador
Construction
Company, Inc.**

April 20, 2016

Department of Transportation
Division of Engineering Services
Office Engineer
1727 30th Street, MS-43
P.O. Box 168041
Sacramento, CA 95816-8041

Attention: Mr. Jeff Defevere
Office Chief
RE: Finding of Beador Bid Nonresponsive
CalTrans Contract 06-0S6004

Mr. Defevere:

Beador Construction Company Inc. hereby protests the State's finding that Beador's bid was non-responsive based on the subcontractor listing form. Beador included Mallard for striping related items shown on the DBE commitment form but apparently failed to click "yes" on the listing form where it request list this subcontractor. Beador however hit the yes button for the items 1, 10, 11, 12, 27 and then again on items 33 and 34 clearly indicating Mallard was the intended striping subcontractor and again listing Mallard on the DBE for all items. The striping items are all done in conjunction together and it is not possible to subcontract out only a portion of the actual striping items. Beador had filled out Mallard for items 28-32 but somehow the yes/no button was inadvertently changed to no. The bid system is antiquated as it is with bidders having to fill out multiple sections of the same subcontractor information if the subcontractor is being listed for more than 5 items as more than 5 items does not fit into a section of subcontractor listing inviting input errors as has occurred here.

The issue of responsiveness cannot and should not be determined simply by the issue failing to click yes or no when the clear intent was inherent and the same "listing" information was presented elsewhere in the submitted bid proposal. "(W)aiver of an irregularity in a bid should be allowed if it would not give the bidder an unfair advantage by allowing it to withdraw in bid without forfeiting its bid bond." *MCM Construction v. City and County of San Francisco*, 66 Cal.App.4th 359, 371 (1998).

To summarize, under California law, a contract must be awarded to the "lowest and responsible" bidder. To be responsive, a bid must conform to the material terms of the bid package. *Menifee v. County of Fresno*, 163 Cal.App.3d 1175 (1985). A bid that differs materially from the bid specifications must be rejected. *Stimson v. Hanley*, 151 Cal 379 (1907). Typically, the material terms of a bid are those that

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affect price, quantity, quality, or delivery and "those terms that the bid package clearly identifies as mandatory". Pozar v. Department of Transp., 145 Cal.App.3d 269 (1983). "Competitive bidding laws are passed for the benefit and protection of the taxpaying public ... Their purposes, among others, are "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public." *MCM* at 372.

More specifically, if this suit were to be brought and this case were to be contested in court, the court would have to decide "whether in any given case a bid varies substantially or only inconsequentially from the call for bids is a question of fact." 47 ops. Cal. Atty. Gen., 129, 131 (1966). Cited in *Ghilotti Construction Co. v. City of Richmond*, 45 Cal.App.4th 897 (1996).

In *Ghilotti*, the court stated "a basic rule of competitive bidding is that bids must conform to specifications and that if a bid does not so conform, it may not be accepted. [Citations.] However, it is well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount for the bid or given a bidder an advantage or benefit not allowed other bidders, or, in other words, the variance is inconsequential." *Ghilotti, supra*, at 904-905. See, *Cypress Security v. City and County of San Francisco*, 184 Cal.App.4th 1003 (2010), citing the above language from *Ghilotti*.

The Controller General determined that a sufficient acknowledgement had been made in situations such as the one affecting Beador. The GAO has held "accordingly, we must conclude that the rejection of Branch's bid as non-responsive for failure to comply with the instructions and the addenda was not proper." Similarly, in *Struksnes Construction Co., Inc.*, 1996 U.S. Comp. Gen. Lexis 1129 (1992), a bidder listed the amendments to an IFB, but incorrectly referred to them as addenda rather than amendments on the outside of an envelope. The court held "In our view, Earth Mover's bid, as submitted, clearly indicates that the award be received and acknowledged that it would comply with the requirements of amendments 001 through 003." The Controller General concluded "Although earth movers failed to complete the acknowledgement within the bid document itself, Earth Mover's acknowledgement on the face of the bid envelope in the space provided for this purpose sufficiently demonstrated the awardees' intent to bound by the amendments, **which makes its bid responsive.**"

Beador Construction hereby requests the State withdraw their finding that Beador's bid was non-responsive and award the contract to the lowest responsible bidder, Beador Construction Company, Inc. Please extend our bid until this issue is resolved.

Should you have questions or comments, please feel free to call.

Sincerely,
Beador Construction Company, Inc.
David A. Beador
David A. Beador
President
REF: 06-0S6004

DEPARTMENT OF TRANSPORTATION

DIVISION OF ENGINEERING SERVICES

OFFICE ENGINEER

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April 19, 2016

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David A. Beador, President
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Corona, CA 92883

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06-Ker, Tul-5, 46, 58, 99, 137, 198-Var
B.O. 3/30/16

Dear Mr. Beador:

The Department of Transportation (Caltrans) received a bid submitted by Beador Construction Company, Inc. (Beador) for the above referenced contract on March 30, 2016. By this letter, Caltrans notifies Beador that its bid is nonresponsive because of an inconsistent Disadvantaged Business Enterprise (DBE) Commitment form and Subcontractor List form.

The instructions on the DBE Commitment form states: "*Names of the First Tier DBE subcontractors and their items of work must be consistent with the Subcontractor List.*"

On the Subcontractor's List form, Beador identified Mallard Construction, Inc. (Mallard) as performing work described as bid items 1, 10-12, 27, 33, and 34. However, on the DBE Commitment form Beador listed Mallard as performing the same bid items and included bid items 28, 29, 30 and 31. The inclusion of these additional items changes the scope of work to be performed by Mallard and constitutes a change that is not consistent with the Subcontractor List form.

Based on the above, Caltrans finds Beador is nonresponsive. Caltrans will proceed to award the contract to the lowest responsible bidder provided all requirements are met.

Your attention is directed to Section 3-1.04 of the 2010 Standard Specifications. Caltrans is not obligated to offer an extension of the award period for a nonresponsive bid. Should you wish to extend your bid while resolving a nonresponsive finding, you must send your request to the Office Engineer no later than 4:00 p.m., two business days prior to the expiration of your bid.

If you have any questions, please contact Mullssa Smith, Contract Awards Branch Chief, at (916) 227-6228.

Sincerely,

JEFF DEFEVERE

Office Chief

Office Engineer, Construction Contract Awards

Division of Engineering Services